IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURIDSICTION

CIVIL REFERENCE NO.1 OF 1998

Asis Ubaldo Rodrigues,
Age 37 years, occ.Service,
Residing at Wheel Bungalow,
Akurdi, Pune 411 035.

Since deceased by legal heirs:

1. Ms.Rosy Asis Rodrigues,
Age 20 yrs.

2. Ms.Clevita Asis Rodrigues,
Age 19 yrs.
Both residing at Douglas Villa,
Akurdi, Pune -35.

3. Ms.Mayara Asis Rodrigues,
Age 12 yrs. By maternal
guardian mother, Smt.Maria
Asis Rodrigues,
Residing at 827, Dastur Meher Road,
Pune-411 001. .. Petitioners

v/s.

Maria Asis Rodrigues,
age 33 yrs. Occ.Housewife,
Residing at C/o.Joseph Pereira,
827, Dastur Meher Road,
Pune 411 001.
and
John Victor D'Souza,
Age about 35 yrs., Occ.Not known
Residing at C/o.Joseph Pereira,
827, Dastur Meher Road,
Pune 411 001. .. Respondents

Mr.Madhav Jamdar for the petitioner.

Mr.Nitin Deshpande i/by Mr.Umesh Deshpande for the respondents.

CORAM : R.M.LODHA, S.R.SATHE &
ANOOP V. MOHTA, JJ.

DATED : 13th January, 2006

ORAL JUDGMENT (Per R.M.Lodha, J.)

The Principal Judge, Family Court No.2, Pune passed the judgment on 9th August, 1996 dissolving

the marriage between the parties under section 10 of the Indian Divorce Act and has referred the matter to this court for confirmation. This is how this civil reference has been placed before us.

2. Asis and Maria got married on 24.1.1982 as per Christian religious rites at Pune. Out of the wedlock, three daughters were born. The matrimonial relationship between the parties got disturbed on diverse grounds. According to Asis, Maria was suffering from some mental disorder prior to the marriage but that was not disclosed. Allegedly after few days of the marriage, Maria started quarreling with Asis and also used to insult his old parents. Maria was taken to Dr.Naik for her medical examination but she refused to cooperate. Maria left the matrimonial home on 24.8.1990 without telling Asis and without his consent. Asis alleged that Maria developed intimate relations with John Victor D'Souza and was having illicit relations with him. In this backdrop, Asis prayed that the marriage solemnized between the parties on 24.9.1982 be dissolved and decree be passed.

3. The notice was issued to Maria as well as John Victor D'Souza. Despite service of notice, neither of them appeared. The petition was proceeded with exparte and as noticed above, the Judge, Family Court ordered dissolution of marriage by his judgment dated 9th August, 1996

and made reference to this court.

4. We may notice here that during the pendency of the civil reference, Asis expired and by a separate order passed today, his three daughters have been brought on record.

5. The first question that falls for our consideration is whether the procedure of decree nisi under the Indian Divorce Act, 1869 is required to be followed in a case where the petition has ben tried and decided by the Family Court under the Family Courts Act,1984.

6. The Indian Divorce Act, 1869 came into operation on the 1st April, 1869. The Act is applicable where either of the parties profess Christian religion and are married in accordance with Christian religious rites and customs. Section 2 provides the extent of power of the court to make decrees of dissolution of marriage or make decrees of nullity of marriage. Section 10 sets out the grounds for dissolution of marriage on diverse grounds in a petition presented to the District Court either by the husband or the wife. Section 17 provides that every decree for dissolution of marriage made by the District Court shall be subject to the confirmation by the High Court. It further provides that cases for confirmation of the decree for dissolution of marriage shall be heard (where the number of the Judges of the High Court is

three or upwards) by a court composed of three such Judges. In the scheme of the Act, first, the decree for dissolution of marriage is passed by the District Judge. That decree is called decree nisi. Then the District Judge refers the said decree to the High Court for confirmation. Section 17 of the Act, prior to the amendment by Act 51 of 2001, provided that every decree for dissolution of marriage made by the District Judge shall be subject to the confirmation by the High Court.

7. The Indian Divorce Act, 1869 has been amended by Act 51 of 2001. The Act is now entitled the Divorce Act, 1869. Interalia sections 10, 11 and 17 have been substituted. Many other provisions have been deleted and some new provisions have been added.

8. The Family Courts Act, 1984 was enacted to provide for the establishment of Family Courts with a view to secure speedy settlement of disputes relating to marriage and family affairs. Section 3 provides for establishment of Family Courts. Section 4 relates to the appointment of Judges of the Family Courts. Section 7(1)(a) provides that subject to the other provisions of the Act, a Family Court shall have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the

explanation. The nature of the suits and proceedings in respect of which the jurisdiction is exercisable by the Family Court are set out in the explanation appended to Section 7. Section 8 excludes the jurisdiction of District Court or any other subordinate civil court in respect of any suit or proceedings of the nature referred to in section 7(1) where a Family Court has been established for the area. Section 19 provides for a remedy of appeal against every judgment and order not being an interlocutory order of a Family Court to the High Court. Section 20 provides that the provisions of the Act shall have effect notwithstanding any inconsistency with any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. The Family Courts Act, 1984 came into force in the State of Maharashtra with effect from 1.12.1986.

9. From the survey of the aforesaid provisions of the Family Courts Act, it can reasonably be concluded that the procedure contemplated in the Indian Divorce Act stood over-ridden on coming into force the Family Courts Act in the State of Maharashtra. The procedure of decree nisi and confirmation by the High Court as provided in the Indian Divorce Act, 1869 has to give way to the procedure provided in the Family Courts Act. The decree for dissolution of marriage passed by the Family Court needs no confirmation since in our considered view the provisions of Family Courts

Act shall prevail over the provisions of Indian Divorce Act, 1869 so far as procedural aspects are concerned. The judgement of the Family Court is subject to the appellate jurisdiction of the High Court under section 19 and is not subject to confirmation as provided in section 17 of the Indian Divorce Act, 1869 as it stood prior to the amendment in the year 2001.

10. The Division Bench of this court in Jyotsna Suresh Jagtap v/s. Suresh John Jagtap, 2001(3) Bomb.C.R.14 was seized with the question "whether after coming into force of the Family Courts Act, 1984 and the establishment of Family Courts Act, the procedure of decree nisi followed by confirmation by the High Court under the Indian Divorce Act, 1869 is to be followed by the Family Court".

11. The Division Bench answered the aforesaid question thus-

> "On and from the date on which the Family Courts were established for any area, the suits or proceedings of the nature contemplated in Clauses (a) to (g) of the Explanation to sub-section (1) of Section 7 of the Family Courts Act, 1984, shall be tried exclusively by the Family Court for that area; any such suits or proceedings already pending before any District Court or Subordinate Court would automatically stand transferred to such Family Court. Any decree made in any such suit or proceeding transferred or initiated in the Family Court, would operate as a final decree and would not require confirmation under section 17 of the Indian Divorce Act, 1869, but shall be subject to the right of appeal under section 19 of the Family Courts Act, 1984".

12. We approve the aforesaid view of the Division Bench.

13. In view of the aforesaid legal position, it has to be held that the reference made by the Family Court for confirmation under section 17 of the Indian Divorce Act, 1869 is uncalled for and no further order needs to be passed by us in the civil reference.

14. Needless to say that the decree passed by the Family Court on 9.8.1996 shall have to be treated as final decree subject to correction in appeal under section 19 of the Family Courts Act, 1984.

Reference is disposed of accordingly. No costs.

(R.M. LODHA, J.)

(S.R. SATHE, J.)

(ANOOP V. MOHTA, J.)